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No. 70

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,
Petitioner,

v.

JOHN LISI, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF CANADA FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

and

BRIEF OF CANADA *AMICUS CURIAE*

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December 20, 1967.

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Canada respectfully moves for leave to file the attached brief as *amicus curiae* in support of the petitioner.

Counsel for the petitioner has consented to the filing of this brief, but counsel for the respondents has refused consent.

Canada is a contracting party to the Warsaw Convention* and to the Hague Protocol**. As a contracting party

* Convention for the Unification of Certain Rules Relating to International Transportation by Air, Concluded at Warsaw, October 12, 1929, 49 Stat. 3000; T. S. 876; Canadian *Carriage by Air Act*. 1939, c. 12, s. 1. See Canada's Notice of Accession to the Convention dated June 10, 1947, the text of which is annexed as Appendix A.

** Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Transportation by Air, September 28, 1955. Printed in Civil Aeronautics Board, Aeronautical Statutes and Related Material 324-66 (1963); Canadian *Carriage by Air Act*, as amended, 12 Eliz. II. Chap. 33 (1963). See Canada's Instrument of Ratification of the Protocol dated March 20, 1964, the text of which is annexed as Appendix B.

with the United States to the Convention, Canada has a direct and continuing interest in securing the uniform implementation of the Warsaw Convention in a manner consistent with the intentions of the contracting parties. The decisions below of the United States Court of Appeals for the Second Circuit and the United States District Court for the Southern District of New York ignore the intentions of the contracting parties, change by judicial fiat a clear and express provision of the Convention embodying the mutual commitments of the contracting governments and are contrary to the uniform construction placed upon this provision by all the contracting parties, including the United States.

Canada has also cooperated with the United States to assure the effectiveness of the special agreement (the so-called "Interim Agreement") developed in Montreal in May 1966 among various air carriers providing for the increase in the limitations of liability applicable under the Convention and Protocol with respect to air carriage to and from the United States.* In consequence of the decisions below, the future operation of the Interim Agreement and its salutary results are in jeopardy.

Canadian air travelers and air carriers, publicly and privately owned, have a profound interest in retaining the benefits for international air travel achieved by the Warsaw Convention in promoting uniformity in ticketing and in regulating air carrier liability. The decisions below threaten to destroy this uniformity.

Canada seeks leave to intervene as *amicus curiae* to voice its objections to the interpretations placed upon the Warsaw Convention by the Courts below and to apprise

* 31 Fed. Reg. 7302 (1966). See Note delivered by the Canadian Embassy in Washington, D.C. to the State Department dated May 12, 1966, the text of which is annexed as Appendix C.

this Court of the serious implications for the future in allowing the decisions below to stand.

For the foregoing reasons, it is respectfully requested that this motion for leave to file a brief as *amicus curiae* be granted.

Dated: December 20, 1967.

Respectfully submitted,

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BRIEF OF CANADA AS *AMICUS CURIAE*

Statement

It is the position of Canada, as a signatory to the Warsaw Convention, that the decision below of the majority of the Court of Appeals does not give effect to the intentions of the contracting parties and that, if permitted to stand, would effect a unilateral and substantive amendment in the Convention. Such a judicially imposed amendment could effectively frustrate the recent steps taken to liberalize the Convention's provisions.

Canada submits that

(1) Article 3 of the Convention does not impose a requirement as a condition for limitation of liability that a prospective passenger receive notice

that the transportation is subject to the rules relating to liability established by the Convention,

(2) it was the intention of the contracting parties under Article 3(2) of the Convention that if an air carrier delivers a ticket to a prospective passenger the limitations of liability under the Convention are applicable,[1] and

(3) the delivery of the tickets in the instant cases fulfilled the requirement under Article 3(2) of the Convention.

Canada further submits that the Interim Agreement[2] developed in Montreal in May 1966 under Article 22(1) of the Warsaw Convention (pursuant to which international air carriers stopping in the United States accept liability without regard to fault up to a limit of $75,000) is bottomed upon continued adherence by the contracting parties to the Convention and to its continued implementation in accordance with the intentions of the contracting parties. The interpretation of the Convention in the decisions below, if left standing, taken in conjunction with the carrier's obligations under the Interim Agreement, could result in absolute and unlimited liability being imposed upon the air carrier without regard to fault.

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1. Article 3(2) provides:

"The absence, irregularity or loss of the passenger ticket does not affect the existence of the validity of the contract of carriage, which shall none the less be subject to the rules of this Convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this Convention which exclude or limit his liability," 49 Stat. 3000, 3015.

2. The Interim Agreement is filed with the Civil Aeronautics Board as C.A.B. Agreement No. 18,900 (Order Series No. E-23680). See 31 Fed. Reg. 7302 (1966). A copy of the text of the Interim Agreement is annexed as Appendix D.

Argument

The Courts below, in their consideration of the airline's ticket involved in this case and in relating it to Article 3 of the Warsaw Convention, expressed two fundamental misconceptions about the Convention: one with respect to the significance of the delivery of the ticket as required by Article 3(2) and the other with respect to the purpose of the enumeration in Article 3(1) of information for inclusion in the ticket.[3]

Under the plan of the Convention, the delivery by the carrier of the passenger's ticket is the act which invokes the full operation of the Convention. As learned commentators have pointed out: "All determinations regarding applicability of the Convention are based on the ticket." Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 500 (1967). These commentators further note: ". . . once the ticket has been issued, it makes no difference to applicability which airline performs the carriage . . ." *id.* at 501. Thus, it is the act of delivering the ticket that is made of controlling significance under Article 3(2).

The notion advanced by the Courts below that the requirement of delivery should be construed as establishing a further and unwritten requirement that the passenger be afforded a "reasonable opportunity" to take steps to protect himself against limitation of liability was adopted from two earlier Court of Appeals cases, *Mertens* v. *Flying Tiger Line, Inc.*, 341 F. 2d 851 (2d Cir. 1965), *cert. denied*, 382 U. S. 816 (1965) and *Warren* v. *Flying Tiger Line, Inc.*, 352 F. 2d 494 (9th Cir. 1965).

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3. The Solicitor General in his argument opposing the petition for a writ of certiorari similarly failed to grasp these aspects of the Convention when he asserted that a literal reading of Article 3(1) would "deprive" that provision of "purpose and meaning." Memorandum for the United States as *Amicus Curiae*, p. 7.

However, in both the *Mertens* and *Warren* cases the Courts were presented with situations where there had in fact been no delivery of a ticket prior to the commencement of the carriers' responsibility for the passengers as laid down in Article 17 of the Convention. Thus the express requirement of Article 3(2) that there be delivery of a ticket had not been complied with before the air travel commenced. The further and indefinite requirement of affording the passenger a "reasonable opportunity" to take some other action, which the Courts in *Mertens* and *Warren* suggested be read into the Convention, was unnecessary to their decisions. The reiteration and expansion of this requirement by the Courts below in the instant cases result in an addition to the Convention which was specifically rejected by the contracting parties.[4]

The further misconception implicit in the decisions below is the notion that Article 3(1), and particularly Article 3(1)(e), has a purpose other than to prescribe a descriptive outline of what the passenger ticket shall include. The declared purpose of the Warsaw Convention was to regulate for international air travel "in a uniform manner"

—"the documents used for such transportation" and
—"the liability of the carrier".
49 Stat. 3000, 3014.

Article 3(1) is not concerned with sanctions, but with describing what, in the interests of uniformity, a passenger ticket for international air travel should contain.

The success of the Convention in this regard is evidenced by the form of ticket involved in the instant cases which was the standard form in general use by substantially all international air carriers, including Canadian air carriers. It was approved by the Civil Aeronautics Board (24 C.A.B. 575 (1957)) pursuant to its powers under the Federal Aviation Act of 1958, 72 Stat. 770, 49 U.S.C. § 1382.

4. A proper construction of the Convention is found, we submit, in Grey v. American Airlines, Inc., 95 F. Supp. 756 (S.D.N.Y. 1950), *aff'd*, 227 F. 2d 282 (2d Cir. 1955), *cert. denied*, 350 U. S. 989 (1956).

Disregarding the fundamental concepts of the Convention relating to the delivery and the description of the ticket, the Courts below in their decisions wrote into the Warsaw Convention their own domestic concept of adequate notice as a condition precedent to the application of the limitation on liability provided for in the Convention. Any such change in the Convention is a subject for multi-lateral negotiation among the contracting parties, not for judicial fiat.[5]

The Courts effected this amendment by lifting one of the descriptive provisions in Article 3(1) to the status of a condition which must be met under Article 3(2), in order for the air carrier to avail itself of the provision in the Convention relating to limitation of liability. There is no basis in the Convention for singling out Article 3(1)(e) as was done by the Courts below. If such decisions are permitted to stand, there can be no logical reason for excluding the other subparagraphs of Article 3(1) as conditions which also would have to be met by the air carrier in order for it to avail itself of the provisions relating to limitation of liability.

Moreover, this judicially imposed requirement creates uncertainty for the air traveler as to his rights and as to the availability of the limitation of liability defense to the air carrier and invites unending litigation and a proliferation of interpretations, including inconsistencies among the various jurisdictions, as to what constitutes adequate

5. Such an amendment to Article 3(2) of the Convention should not be confused with unilateral steps properly taken by contracting parties within their own jurisdictions to regulate the manner in which carriers bring to the attention of passengers the applicability of the Convention's limitations on liability. The C.A.B. on behalf of the United States has properly taken such unilateral action in regulating the carriers' activities within the United States. 14 C.F.R. §221.175 (1967). But, it is one thing for the United States to require carriers to take certain action within the United States; it is quite a different matter for the United States, either by its responsible administrative agency or by its courts, unilaterally to impose as a sanction for failure to comply with these regultions the removing of the Convention's limit of liability.

notice.[6] Such judicial rewriting of the Convention is incompatible with the principles laid down by this Court with respect to the effect and interpretation of treaties.

As a treaty made under the authority of the United States the Warsaw Convention is a part of the "supreme Law of the Land". U. S. Const. art. VI, § 2. It may not be vitiated or amended in its implementation by reading into it requirements of local domestic law relating to notice and providing for sanctions for failure to comply with such local requirements. The plain language of Article 3(2) permits limitation of liability in all instances except where no ticket is delivered by the carrier.

Deviation from the purport of language and clear intention of the contracting parties to a treaty is not permissible. *The Amiable Isabella,* 19 U. S. (6 Wheat.) 1, 71 (1821); *Maximov* v. *United States,* 373 U. S. 49, 54 (1963).

Moreover, in ascertaining the meaning of a treaty it is appropriate to look to the negotiations of the contracting parties and to their own practical construction of the treaty. *Factor* v. *Laubenheimer,* 290 U. S. 276, 294-95 (1933); see also *Block* v. *Campagnie Nationale Air France,* Docket No. 21609, CA 5, Nov. 8, 1967 (Slipsheet, pp. 28-31).

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6. One need not look beyond the decisions of the Courts below for an example of the problems created by the strained interpretation of Article 3(2). The District Court determined that the language on the ticket in question in this case would have consituted adequate notice had it been readable (253 F. Supp. 237, 243 n. 7). On the other hand, despite the fact that the Civil Aeronautics Board had approved the very form of passenger ticket involved in these cases, 24 C.A.B. 575, the Court of Appeals stated that it was highly questionable whether the language contained on the ticket would have constituted adequate notice even if readable (370 F. 2d 508, 514 n. 10). The differing opinions on the question of adequate notice, both as to substance and form, are limited only by the number of courts willing to entertain this question in the applicable jurisdictions of the various contracting parties.

The history of the negotiations in the period 1925 to 1929, treated in the petitioner's brief, shows that the contracting parties expressly rejected the language which the Courts below read into the Convention. Moreover, the proceedings at The Hague in 1955, similarly treated in petitioner's brief, confirm that the practical construction given the Convention by the United States as well as other contracting parties was contrary to the interpretation of the Courts below.

The recent judicially imposed requirement of notice under Article 3(2) of the Convention is particularly untenable when viewed with the 1966 Interim Agreement among various international air carriers (see Appendix D), which was prompted by the action taken by the United States to withdraw from the Convention.

On November 15, 1965, the United States gave notice of its denunciation of the Warsaw Convention. On the same day it issued a press release stating it would be prepared to withdraw the notice of denunciation if there were a reasonable prospect of an international agreement on limits of liability in the area of $100,000 per passenger and suggesting that, pending such international agreement, an arrangement among principal international airlines could be arranged waiving the limits of liability up to $75,000 per passenger. 53 Dep't State Bull. 923 (1965). The effective date of the denunciation, as provided in Article 39 of the Convention, was to be May 15, 1966.

Immediately prior to the effective date, Canadian and American air carriers, as well as other air carriers, entered into the Interim Agreement, the recognized purpose of which was to provide a basis upon which the United States would withdraw its notice of denunciation of the Convention. 31 Fed. Reg. 7302 (1966).

The Interim Agreement embodies two significant provisions:

1. It increased the limit of liability from approximately $8,300 to $75,000 per person on transportation to, from or with an agreed stop in the United States;[7] and

2. It provided for waiver by the air carriers of Article 20(1), which would otherwise enable the air carrier to avoid liability if it proved that it took necessary steps to avoid the damage or proved that it was impossible to take such measures.

Thus, the Interim Agreement resulted in the imposition of absolute liability of up to $75,000 upon the signatory carriers for all provable damages assuming the passenger did not cause or contribute to the damages. In addition, the Agreement set forth an exact form of notice as well as the type point to be used on or attached to the ticket, ticket envelope, or a piece of paper placed in the ticket envelope or attached to the ticket.

On May 11, 1966 the Canadian Air Transport Board telegraphed the Civil Aeronautics Board that on the assumption the United States was withdrawing denunciation of the Warsaw Convention the Air Transport Board would accept filings incorporating the provisions of the Interim Agreement. In a subsequent Note to the State Department, the Canadian Embassy informed the United States that the text of this telegram reflected the views of

7. $58,000 in jurisdictions where provision is made for separate award of cost of litigation.

the Canadian Government in this matter. See Appendix C. On May 16, 1966, the United States announced its decision to withdraw its notice of denunciation.[8] On the same day, the Civil Aeronautics Board approved the Interim Agreement by Order, stating:

> "The U. S. Government has concluded that such arrangements [*i.e.*, the Interim Agreement] warrant withdrawal of the Notice of Denunciation of the Warsaw Convention. *Implementation of the agreement will permit continued adherence to the Convention with the benefits to be derived therefrom,* but without the imposition of the low liability limits therein contained upon most international travel involving travel to or from the United States." 31 Fed. Reg. 7302 (1966). (Emphasis supplied.)

The Canadian Government in its diplomatic note at the time expressed the hope that the Interim Agreement would be replaced by appropriate amendment to the Warsaw Convention and the Hague Protocol through diplomatic conference as soon as possible. See Appendix C.

If the decision below, and the reasoning upon which it is based, is not reversed, the signatories to the Interim Agreement, having waived any defenses they otherwise might have had under Article 20(1) of the Convention, would find themselves faced with uncertainty as to their limitation of liability, which would be dependent upon a showing that "adequate notice" of the Convention was contained on the ticket. The result would be absolute

8. Dep't of State Press Releases Nos. 110 and 111, May 13 and 14, 1966; 54 Dep't State Bull. 955-57 (1966).

but limited liability (up to $75,000) by reason of the Interim Agreement, but potential absolute and unlimited liability were the notice deemed by any court to be "inadequate". Thus, the Courts below, by their arbitrary construction of Article 3 have added an abiding uncertainty regarding the application of the Convention and thereby have jeopardized the recent steps taken, as reflected in the Interim Agreement, to liberalize the Convention provisions.

CONCLUSION

The decision and judgments below should be reversed.

Dated: December 20, 1967.

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